

BURTON O. BARBER

IBLA 73-286

Decided May 15, 1974

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, setting the amount of the bond required of the mineral claimant in W-37361.

Affirmed as modified.

Mineral Lands: Mineral Reservation--Mining Claims: Surface Uses--
Stock-raising Homesteads

Since one who located a mining claim on stock-raising homestead lands implies that he intends to reenter upon the land and that he has made a discovery thereon, he is no longer a prospector within the purview of the Stock-raising Homestead Act and in the absence of consent of, or an agreement with, the entryman or surface owner, the mineral claimant is required to post a good and sufficient bond to assure compensatory protection to the surface owner.

APPEARANCES: Howell C. McDaniel, Jr., Esq., Murane, Bostwick, McDaniel, Scott & Greenlee, Casper, Wyoming for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Burton O. Barber has appealed from a decision of the Wyoming State Office, Bureau of Land Management, dated February 1, 1973. This determined that Lowell A. Rasmussen is required to furnish a corporate bond in the amount of \$3,000 to secure payment to the surface owner of possible damages to crops, tangible improvements

and grazing values, such damages resulting from drilling and surface exploration, but not mining, on the Joy nos. 1 through 14 lode mining claims. The mining claims involved, located in July 1968, are situated on lands presently owned by Burton O. Barber and his son, Robert Barber. They were originally patented under the provisions of the Stock-raising Homestead Act of December 29, 1916, 43 U.S.C. § 299 (1970), with minerals reserved to the United States.

Rasmussen filed a bond in the amount of \$1,000 in purported compliance with sec. 9 of the Stock-raising Homestead Act, supra, as supplemented by the Act of June 21, 1949, 30 U.S.C. § 54 (1970), and the regulations thereunder, 43 CFR Part 3814. Barber filed objections to the \$1,000 bond asserting: (1) the amount of the bond was insufficient; (2) until the Joy mining claims are determined to be valid and superior to the prior located Yike mining claims of the Kerr-McGee Corporation on the subject lands, Rasmussen is not entitled to have the bond approved; and (3) there is no authority under the law or regulations for the Bureau of Land Management to approve or accept a bond for the purposes set forth on the face of the bond, i.e., "limited to exploration drilling and associated activities and not mining."

These assertions are identical with those made on appeal in this case to the Board of Land Appeals from the Wyoming State Office decision which set the amount of bond required at \$3,000 by reason of Rasmussen's allegation that activities on the mining claims would be limited to drilling and surface exploration, excluding mining.

All entries made and patents issued pursuant to the Stock-raising Homestead Act reserve to the United States the coal and other minerals in the lands entered and patented. Section 9 of the Act of December 29, 1916, as amended, 43 U.S.C. § 299 (1970), as quoted below, provides remedies for the surface owner for damages to the surface caused by a mining claimant:

* * * Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered and patented, as provided by said sections, for the purpose of prospecting for coal or other minerals therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman

or patentee for all damages to crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure payment of such damages to the crops or tangible improvements of the entrymen or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situated, subject to appeal to the Secretary of the Interior or such officer as he may designate * * *. [Emphasis supplied.]

The Stock-raising Homestead Act is supplemented by the Act of June 21, 1949, 30 U.S.C. § 54 (1970), which enlarged the liability of the mineral claimant to include "any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removal of minerals."

The clear purpose of the statute and amendment is not to restrict prospecting and mining operations on land entered or patented under the Stock-raising Homestead Act, but to assure compensatory protection to the homesteader or surface owner. McMullin v. Magnuson, 78 P. 2d 964, 973 (Colo. 1938).

A mineral prospector who locates a mining claim on stock-raising homestead land, by virtue of his mining location, implies that he has made a discovery. Thus, he is no longer a prospector

and, absent consent of or agreement with the surface owner, prior to reentry he is required to post bond for compensatory protection of the surface owner. A. J. Maurer, Jr., 15 IBLA 151 (1974) 81 I.D. 139 (1974); Smith Land Company, 15 IBLA 280 (1974). The amount of the bond to be furnished by a locator of a mining claim asserting rights under the mining laws does not depend upon his proposed activities upon the stock-raising homestead land, but upon possible damages based upon the value of the crops and permanent improvements of the surface owner, and the value of the land for grazing, as required under the Stock-raising Homestead Act, as amended, supra. This Department is charged with determining the amount of the bond. 1/ The foregoing findings and the setting of the amount of bond required, however, are not to be construed as a finding of validity of the mining claims. 2/

Appellant further asserts on appeal as follows:

The Land Office should insist, in cases where there is a dispute between mining claimants, that such dispute be determined by a court of competent jurisdiction prior to entertaining jurisdiction as to whether or not a bond should be issued for the protection of the surface owner.

The answer is that 43 U.S.C. § 299 (1970), requires the bond "to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior * * *." Thus the statute clearly vests in this Department the authority to approve such bonds. This, of course, encompasses the authority to disapprove such bonds. The statute places in the courts the authority to fix the amount of damages actually incurred from mining operations, without reference to the amount of the bond. It seems clear, therefore, that disputes as to the amount of such bonds is committed to resolution by this Department. A. J. Maurer, Jr., supra.

1/ Joseph Brenner, Jr., A-21582 (February 17, 1939), which appellant cites as to the contrary, is distinguishable from the instant case in that in Brenner the Department refused to approve a mineral bond by reason of objection to the form in which the bond was presented and for the further, and more cogent reason, that previously, as a result of contest proceedings, the mining locations involved had been invalidated.

2/ A contest proceeding would be necessary to determine whether these mining claims are invalid.

The record shows that following an examination of the subject property and an appraisal of the statutory compensatory values thereon by qualified employees of the Casper District Office, Bureau of Land Management, a recommendation was made to the Wyoming State Office that the amount of the mineral bond required be set at \$10,000. On the ground that the mineral claimant's proposed activities would be limited to drilling and surface exploration, however, the State Office determined by its decision now on appeal that a \$3,000 bond is required for compensatory protection of the surface owner and disapproved the \$1,000 bond tendered by Rasmussen.

In compliance with the Wyoming State Office decision, Rasmussen furnished a new bond in the amount of \$3,000.

Appellant's assertion of insufficiency of the \$3,000 bond, or the \$1,000 bond, is not accompanied by any information or data indicating the amount of bond appellant deems sufficient for compensatory protection. Consequently, we rely on the appraisal and recommendation of the District Office, based upon an examination of the land involved. The decision appealed from is hereby modified and the amount of the bond required is set at \$10,000. Accordingly, the \$3,000 bond tendered is disapproved.

Even though Rasmussen presently intends to reenter only for drilling and exploration activities, prior to reentry he must post a bond in the amount of \$10,000. He is not permitted to engage in mining operations on the property involved until a bond in that amount is tendered and approved, unless in lieu thereof, he has obtained written consent of, or an agreement with, the surface owner.

With respect to the alleged prior located mining claims on the land involved, the decision below properly pointed out that the question of right of possession under the mining laws can be determined only by a court of competent jurisdiction and is a matter between the adverse or rival mineral claimants. This is a long-standing rule. Alice Placer Mine, 4 L.D. 314, 316 (1886), quoted with approval in Clipper Mining Co. v. Ely Mining & Land Co., 194 U.S. 220, 223 (1904); Chrisman v. Miller, 197 U.S. 313 (1904); cf. 30 U.S.C. § 29 and § 30 (1970). Consequently, the question of right of possession is between the locators and is no concern of the Government in the instant case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

